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DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION

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FROM: Department of Justice
Environment and Natural Resources Division
Wildlife and Marine Resources
PO Box 7369
Washington, DC 20044-7369

SENT BY: Kristen Byrnes Floom
Fax No. 202-305-0275
Voice No. 202-305-0340

TO: Debra A. Hecox

FAX No. 303-231-5363

RE: Black Hills Dipper et al. v. Norton et al., Case No. 04-CV-1293 (D.D.C.)

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 9

Debra

Attached is a copy of the Black Hills Dipper settlement agreement, filed today in the D.D.C., for your files.

Happy New Year.

Kristen

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLACK HILLS DIPPER, et al.,

Plaintiffs,

v.

GALE NORTON, et al.,

Defendants.

Civ. No. 1:04CV01293 (RJL)

STIPULATED SETTLEMENT AGREEMENT AND [PROPOSED] ORDER

Plaintiffs Black Hills Dipper, Biodiversity Conservation Alliance, Center for Native Ecosystems and Jeremy Nichols and Defendants Gale Norton, in her official capacity as Secretary of the Interior and Steven Williams, in his official capacity as Director of the U.S. Fish and Wildlife Service (collectively, the "Parties"), by and through their undersigned counsel, stipulate as follows:

WHEREAS, on March 15, 2003, Plaintiffs Biodiversity Conservation Alliance, Center for Native Ecosystems and Jeremy Nichols, among others submitted a petition to list the Black Hills Dipper as endangered or threatened ("Petition"). Defendants received this Petition to list the Black Hills Dipper on March 28, 2003, more than one year ago;

WHEREAS, by letter dated July 15, 2003, Plaintiffs provided Defendants with written notice of their intent to sue for this violation of section 4 of the Endangered Species Act ("ESA"): See 16 U.S.C. § 1540(g)(2)(C);

WHEREAS, on August 2, 2004, the Plaintiffs filed this action alleging that the Defendants are in violation of Section 4(b)(3)(A) the Endangered Species Act, 16 U.S.C. § 1533(b)(3)(A), by failing to make a determination whether the Petition presents substantial

information that listing may be warranted;

WHEREAS, the Parties subsequently engaged in settlement discussions and agreed in principle to settle this matter on terms mutually agreeable to the parties;

WHEREAS, Plaintiffs and Defendant, through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to Plaintiffs' claims, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes set forth in Plaintiffs' Complaint;

WHEREAS, all parties agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve the dispute between them;

NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS FOLLOWS.

1. The U.S. Fish and Wildlife Service ("Service") shall deliver to the Office of the Federal Register for publication in the Federal Register, on or by January 20, 2006, a determination of whether the Petition presents substantial information indicating that listing may be warranted. See 16 U.S.C. § 1533(b)(3)(A).

2. In the event of a determination that the Petition presents substantial information indicating that listing may be warranted, the Service shall deliver to the Office of the Federal Register for publication in the Federal Register, on or by November 20, 2006, a determination whether the Petition is warranted, not warranted, or warranted but precluded by other listing activity. See 16 U.S.C. § 1533(b)(3)(B). In the event of a published determination that the Petition does not present substantial information that listing may be warranted, no further action is required under this Stipulated Settlement Agreement ("Agreement").

3. Either party may seek to modify the deadline for any actions specified in

Paragraphs 1 and 2 for good cause shown, consistent with the Federal Rules of Civil Procedure. In that event, or in the event that either party believes that the other party has failed to comply with any term or condition of this Agreement, the parties shall use the dispute resolution procedures specified in Paragraph 4.

4. The Order entering this Agreement may be modified by the Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between the parties filed with and approved by the Court, or upon written motion filed by one of the parties and granted by the Court. In the event that either party seeks to modify the terms of this Agreement, including the deadline for the actions specified in Paragraph 1 and 2, or in the event of a dispute arising out of or relating to this Agreement, or in the event that either party believes that the other party has failed to comply with any term or condition of this Agreement, the party seeking the modification, raising the dispute or seeking enforcement, shall provide the other party with written notice of the claim. The parties agree that they will meet and confer (although in-person conference is not required) at the earliest possible time in a good-faith effort to resolve the claim before bringing any matter to the Court. If the parties are unable to resolve the claim within 30 days after the notice, either party may bring the claim to the Court.

5. No party shall use this Agreement or the terms herein as evidence of what does or does not constitute a reasonable timeline for making a substantial information determination or a warranted, not warranted, or warranted but precluded determination in any other proceeding regarding the Service's implementation of the ESA.

6. Defendants agree that Plaintiffs are the "prevailing party" in this action, and agree to pay Plaintiffs' reasonable attorneys' fees and costs. Therefore, Defendants agree to settle

Plaintiffs' claims for costs and attorneys' fees in the above-captioned litigation for a total of \$11,200. A check will be made payable in that amount to Biodiversity Conservation Alliance and mailed to Biodiversity Conservation Alliance, Attn: Jeremy Nichols, P.O. Box 1512, Laramie, WY 82073. Defendants agree to submit all necessary paperwork to the Department of the Treasury's Judgment Fund Office, pursuant to 16 U.S.C. § 1540(g)(4), within ten (10) business days of receipt of the signed court order dismissing this action.

7. Plaintiffs agree to accept payment of \$11,200 in full satisfaction of any and all claims for attorneys' fees and costs of litigation to which Plaintiffs are entitled in the above-captioned litigation, through and including the date of this Agreement.

8. Plaintiffs agree that receipt of this payment from Defendants shall operate as a release of Plaintiffs' claims for attorneys' fees and costs in this matter, through and including the date of this agreement;

9. The parties agree that Plaintiffs reserve the right to seek additional attorneys' fees and costs incurred subsequent to this Agreement arising from a need to enforce or defend against efforts to modify the underlying schedule outlined in Paragraphs 1 and 2, or for any other unforeseen continuation of this action;

10. By this Agreement, Defendants do not waive any right to contest fees claimed by Plaintiffs or Plaintiffs' counsel, including the hourly rate, in any future litigation, or continuation of the present action. Further, this stipulation as to attorneys' fees and costs has no precedential value and shall not be used as evidence in any other attorneys' fees litigation.

11. Subject to the qualifications in Paragraph 12, no provision of this Agreement shall be interpreted as or constitute a commitment or requirement that the Defendants take action

in contravention of the Endangered Species Act ("ESA"), the Administrative Procedure Act ("APA"), or any other law or regulation, either substantive or procedural. Nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded to the Service by Section 4(b)(2) of the ESA, the APA, or general principles of administrative law with respect to the procedures to be followed in developing the determinations required herein, or as to the substance of the determinations.

12. Defendants assert that no provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants are obligated to spend funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. In response, Plaintiffs assert that this Agreement does not create a conflict with the Anti-Deficiency Act because the duty to make the determinations is required in non-discretionary terms by the ESA and because the Anti-Deficiency Act would not excuse compliance with a pre-existing court-approved Agreement, which had been previously discussed by the parties. Plaintiffs intend to assert this position if the Service fails to comply with the terms of this Agreement for reasons of insufficient appropriations. The Service reserves all legal and equitable defenses to such a claim.

13. The parties agree that this Agreement was negotiated in good faith and it constitutes a settlement of claims that were vigorously contested, denied, and disputed by the parties. By entering into this Agreement, Plaintiffs and Defendants do not waive any claim or defense.

14. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to the Court's entry of the terms and conditions of this Agreement and do hereby agree to the terms herein.

15. The terms of this Agreement shall become effective upon entry of an order by the Court ratifying this Agreement.
16. Upon approval of this Agreement, all counts of Plaintiffs' Complaint shall be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1).
17. Notwithstanding the dismissal of this action, the parties hereby stipulate and respectfully request that the U.S. District Court retain jurisdiction to oversee compliance with the terms of this Agreement and to resolve any motions to modify such terms. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

DATED: December 30, 2004.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
JEAN WILLIAMS, Section Chief
LISA RUSSELL, Assistant Section Chief

/s/ Kristen Byrnes Floom
Kristen Byrnes Floom, Trial Attorney
D.C. Bar No. 469615
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Attorneys for Defendant

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/s/ Robert Ukeiley
ROBERT UKEILEY (MD 14062)
Law Office of Robert Ukeiley
433 Chestnut St.
Berea, KY 40403
(859) 986-5402
(859) 986-1299 fax

Attorney for Plaintiffs

APPROVED AND SO ORDERED.

DATED, this ____ day of _____, 200_.

RICHARD J. LEON
United States District Judge

District of Columbia live database

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Other Documents

1:04-cv-01293-RJL BLACK HILLS DIPPER et al v. NORTON et al

U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was received from Floom, Kristen entered on 12/30/2004 at 10:30 AM EDT and filed on 12/30/2004

Case Name: BLACK HILLS DIPPER et al v. NORTON et al

Case Number: 1:04-cv-1293

Filer: GALE NORTON

STEVEN WILLIAMS

Document Number: 13

Docket Text:

STIPULATION of Settlement and Proposed Order by GALE NORTON, STEVEN WILLIAMS.
(Floom, Kristen);

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: H:\PDF\Black Hills Dipper Settlement Agreement final.pdf

Electronic document Stamp:

[STAMP docctStamp_ID=973800458 [Date=12/30/2004] [FileNumber=634463-0]
[87db1cf57b68bd5bbbcb0b4456e03bcdce64e8a80e1215f03f79708ea7aaa9af028
9c9328fd76e89e5b711063e5b97e5a07a65bca63f3e410906f954f312e50]]

1:04-cv-1293 Notice will be electronically mailed to:

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Robert Steven Ukeiley rukeiley@igc.org

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